

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

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U.S. PATENT AND TRADEMARK OFFICE  
BOARD OF PATENT APPEALS  
AND INTERFERENCES

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

Ex parte ROBERT E. FISCHELL, DAVID R. FISCHELL and DAVID C. MAJERCAK

Appeal No. 2005-0954  
Application No. 09/609,163

HEARD: August 10, 2005

Before PATE, NASE and BAHR, Administrative Patent Judges.  
BAHR, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 50-54, which are all of the claims pending in this application.

BACKGROUND

The appellants' invention relates to a stent. Claim 50 is representative of the invention and is reproduced in the appendix to the appellants' brief.

The examiner relied upon the following prior art references of record in rejecting the appealed claims:

Richter 5,807,404 Sep. 15, 1998

Hess et al. (Hess) WO 98/40035 Sep. 17, 1998

The following rejections are before us for review.

Claims 50, 53 and 54 stand rejected under 35 U.S.C. § 103 as being unpatentable over Hess.

Claims 51 and 52 stand rejected under 35 U.S.C. § 103 as being unpatentable over Hess in view of Richter.

Claims 50-54 stand rejected under 35 U.S.C. § 103 as being unpatentable over Richter in view of Hess.<sup>1</sup>

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellants regarding the above-noted rejections, we make reference to the answer for the examiner's complete reasoning in support of the rejections and to the brief (filed September 30, 2002) for the appellants' arguments thereagainst.

### OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellants' specification and claims, to the applied prior art references, and to the

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<sup>1</sup> Although the examiner did not repeat this rejection in the answer (mailed August 12, 2003), the examiner's agreement on page 2 of the answer with the appellants' statement of the issues in the brief, which includes this rejection, indicates the examiner's intent to maintain this rejection.

respective positions articulated by the appellants and the examiner. As a consequence of our review, we make the determinations which follow.

Each of the examiner's rejections relies in part on the examiner's determination that Hess teaches or suggests connecting the tubular sections (A, B) with sine wave shape wavy strips (Figure 12B) in the manner shown in the examiner's Figure 4B on page 4 of the answer. With the examiner's proposed construction of the Hess stent with wavy strips according to Figure 12B, the sine wave shaped wavy strip 40' lacks at least four curved segments that each have a proximal and distal end with a line joining the proximal and distal ends being generally parallel to the stent's longitudinal axis, the curved segments being connected together in series by three generally circumferentially extending segments of approximately equal length, as called for in claim 50. Specifically, in the wavy strip 40' as drawn by the examiner, the lines connecting the proximal and distal ends of the curved segments are offset from the longitudinal axis by the angle of shift of the sine wave from the longitudinal axis and the segments joining the curved segments are likewise offset from the circumferential direction of the stent by the same angle of shift.

Moreover, we find no teaching or suggestion in Hess to orient the sine wave shaped wavy strip illustrated in Figure 12B between the tubular sections (A, B) at an angle to the longitudinal axis as illustrated by the examiner in Figure 4B on page 4 of

the answer.<sup>2</sup> Rather, Hess would appear to have taught or suggested connecting the sine wave shaped wavy strip 102 between tubular sections in the orientation shown in Figure 12B, namely, with the sine wave extending parallel to the longitudinal axis of the stent.

For the reasons discussed above, each of the examiner's rejections is fatally flawed and cannot be sustained.

REMAND TO THE EXAMINER

We remand this application to the examiner pursuant to 37 CFR § 41.50(a)(1) for consideration of the following issue.

As discussed above, it is apparent to us that Hess teaches or suggests a stent having tubular sections (A, B) connected with sine wave shaped wavy strips as illustrated in Figure 12B, with the sine wave shaped wavy strips oriented as shown in Figure 12B, namely, with the sine wave extending parallel to the longitudinal axis of the stent. Moreover, Hess illustrates the wavy strips in Figures 1, 3 and 4 as connected to the curved segments 30 of the aligned segments 22 at positions offset from the centers of the curved segments. The examiner should consider whether the teachings of Hess on page 11 and in Figure 12B, when viewed in light of the illustration in Figures 1, 3 and 4, would have instructed one of ordinary skill in the art to likewise connect the sine wave shaped wavy strips in such off-center fashion to the curved segments and, if so, whether the structure recited in claim 50 would result.

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<sup>2</sup> The appellants' counsel insinuated as much at the hearing.

## CONCLUSION

To summarize, the decision of the examiner to reject claims 50-54 under 35 U.S.C. § 103 is reversed and the application is remanded to the examiner for the reasons discussed above.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

**REVERSED AND REMANDED**

  
WILLIAM F. PATE, III  
Administrative Patent Judge

  
JEFFREY V. NASE  
Administrative Patent Judge

  
JENNIFER D. BAHR  
Administrative Patent Judge

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